Free Movement of Persons and the Wholly Internal Rule

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FREE MOVEMENT OF PERSONS AND THE WHOLLY INTERNAL RULE: TIME TO MOVE ON?

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1. Introduction

The expectation that EC law is invoked only where a given situation falls within the scope of the Treaty might seem too obvious even to be stated. In particular, activating EC law on the free movement of persons has depended traditionally – and fairly logically – on a basic notion residing firmly within that phrase: a requirement of *movement*, from the territory of one Member State to that of another, thus generating the requisite cross-border element.[1] Basically: no movement, no free movement protection. Again, this would seem fair and sensible. The resultant existence of "reverse" discrimination – where a (static) home national may be treated less favourably than someone from another Member State who could invoke EC law in similar factual circumstances – is usually conceived as an unusual but inevitable, and acceptable, corollary of non-interference by the Community in the internal affairs of the Member States. This conclusion, however, can no longer be drawn quite so readily.

First, the span of Community law affecting "persons" has stretched appreciably in recent years, so that the reserve of "purely internal" issues is considerably reduced as a result. On the one hand, the objectives of the original Treaty of Rome no longer reflect the scope of EC reality – or ambition.

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1. Not all cross-border circumstances have been allowed to trigger the application of the Treaty (see esp. Case C-112/91, *Werner* v. *Finanzamt Aachen-Innenstadt*, [1993] ECR I-429); the continuing legitimacy of this decision has been called into question, however, as discussed in Section 4 below. It should also be noted that movement in a physical sense is not necessary in the context of services, see e.g. the decisions in Case C-18/93, *Corsica Ferries Italia* v. *Corpo dei Piloti del Porto di Genova*, [1994] ECR I-1783; Case C-384/93, *Alpine Investments* v. *Minister van Financiën*, [1995] ECR I-1141 – but the requisite cross-border element requires still to be satisfied (see e.g. Case C-60/91, *Criminal Proceedings against Morais*, [1992] ECR I-2085, in which it was observed, at para 7, that ". . . the Court has consistently held that the Treaty provisions on free movement of persons and services cannot be applied to activities which are confined in all respects within a single Member State. . . .").

The creation of EU citizenship at Maastricht, as well as the immigration policy competence effected at Amsterdam, are especially illustrative here. Moreover, the gradual expansion of (horizontal) direct effect by the Court of Justice – most recently in respect of Article 39 EC[2] – means that the reach of Community protection has spread also in a less obvious sense. All of this feeds into the relative ease with which a Community connection can now be established. Finally, the typical invocation of the Treaty does still involve some cross-border element, but the range of circumstances in which individuals seek to rely on EC law against their own Member States continues to broaden.

There is clearly a whole variety of issues which belong properly within national competence; it is not the intention here to argue for wholly omnipotent EC institutions. But, in the specific context of the free movement of persons, it is becoming more and more difficult to make sense of situations left outside the EC protection net – to rationalize why crossing an internal (regional) border might require the payment of university fees whereas crossing an external (but intra-EU) border does not; why a third country national parent may only come to join his/her Community national offspring if the latter leaves his/her own Member State; why a qualification obtained in another Member State can provide the key to an employment competition or a better salary where an equivalent home diploma might not; or why the third country national spouse of an EU citizen might be able to reside with their spouse (and even engage in economic activity) in every Member State but their spouse's own. These are the types of situations which can generate reverse discrimination. Of course, there is a strong argument that it is up to the Member States individually to redress imbalances between national and Community standards. But this assertion begins to lose its potency against the backdrop of EU fundamental rights protection, so solemnly "proclaimed" at Nice,[3] and the internal effect of both the Framework and Race Directives adopted under Article 13 EC.[4] And it becomes even more difficult to justify the reverse discrimination anomaly in light of the awaking animation of Union citizenship in ECJ case law, as well as in legislative proposals tabled recently by the Commission. It is not so much that movement is problematic or redundant as a criterion in itself; it is more that the profound extent to which Community law can now bear on a person's life seems increasingly

2. See Case C-281/98, *Angonese* v. *Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139, para 36.

3. For further discussion of reverse discrimination in the specific context of the EU Charter of Fundamental Rights, see Nic Shuibhne, "The EU and fundamental rights: Well in spirit but considerably rumpled in body?", in Beaumont, Lyons and Walker (Eds.), *Convergence and Divergence in European Public Law* (Oxford, Hart, 2002), pp. 177–196.

4. Directive 2000/78/EC, O.J. 2000, L 303/16 and Directive 2000/43/EC, O.J. 2000, L 180/22 respectively.

to devalue movement as a precondition for these advantages to adhere in the first place.

This paper first charts the entrenchment of the wholly internal rule in the context of Article 39 EC; the more normative debate on the character of reverse discrimination – is it nationality discrimination, or is it something else? – will also be introduced. The ways in which this seemingly clear-cut rule has actually been unsettled will then be explored, looking at the expansionist trends raised above and the extent to which the purely internal reserve has been punctured as a result. The deepening significance of EU citizenship is especially relevant here, given the fundamental consequences that the action of movement now generates. Some legislative and judicial choices needing to be made will then be outlined. Finally, if reverse discrimination is established to be a problem, consideration of how best to treat it must be discussed. Is the problem national or "European", legislative or judicial? The question posed throughout, however, can be expressed at its most basic as follows: in light of the erosion, even displacement, of the wholly internal rule now intensifying, is it time simply to move on?

2. The beginning: Entrenching the wholly internal rule

Poiares Maduro has described *Knoors*,[5] *Auer*[6] and *Saunders*[7] as "[t]he three paradigmatic cases where the Court of Justice established the core of its approach to reverse discrimination and purely internal situations. . . ."[8] Of these three, the classic interpretation of Article 39 EC in this context is found in *Saunders* (the other two relating to freedom of establishment). Invited to consider the legitimacy of a mobility restriction (imposed by the UK on a British national, in the context of criminal penalties and effective within the territory of the UK only), the Court stated succinctly that "[t]he provisions of the Treaty on freedom of movement for workers cannot . . . be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law."[9] Kon has argued, however, that ". . . the judgment does not

5. Case 115/78, *Knoors* v. *Staatssecretaris van Economische Zaken*, [1979] ECR 399.
6. Case 136/78, *Ministère Public* v. *Auer*, [1979] ECR 437.
7. Case 175/78, *R* v. *Saunders*, [1979] ECR 1129.
8. Poiares Maduro, "The scope of European remedies: The case of purely internal situations and reverse discrimination", in Kilpatrick, Novitz and Skidmore (Eds.), *The Future of European Remedies* (Oxford, Hart, 2000), pp. 117–140 at 118. There is also considerable discussion of these early cases in Kon, "Aspects of reverse discrimination in Community law", 6 EL Rev. (1981), 75–101 and Pickup, "Reverse discrimination and freedom of movement for workers", 23 CML Rev. (1986), 135–156.
9. *Saunders*, para 11.

fully explain why the Court chooses to take such a restrictive view as to when a State can be guilty of discrimination against its own nationals and such an extensive view of the competence retained by Member States in being entitled to accord differential treatment to their own nationals."[10] This criticism lies essentially in the Court's strict reading of Article 39(3), the wording of which arguably allowed for a broader construction (". . . to move freely within the *territory of Member States* . . . ") or, in other words, for internal application, akin to Article 141 EC on sex discrimination. The Treaty provisions on social policy reflect, on one view, objectives of an entirely different character, the need to "move" from one Member State to another before EC law protection can be triggered being, therefore, immaterial;[11] yet, ironically, when later determining the direct effect of Article 39(2), the Court drew expressly from the Article 141 ethos, citing the need for uniformity of protection, from the perspective of workers, in the labour market.[12] In *Saunders*, however, the Court located the objectives of Article 39 firmly within the ambit of the provision's more predominant themes – movement and the protection of migrant, not home, workers.[13] Advocate General Warner had taken quite a different interpretative view, unpicking the various elements of Article 39 and severing the objectives of equal treatment and free movement.[14]

A closer reading of the judgment in *Saunders* offers, however, something of a textual ambiguity; the Court actually confined the decision very specifically to the powers of the Member States in the criminal law context, while observing also that ". . . the rights conferred upon workers by Article [39] may lead the Member States to amend their legislation, where necessary, *even with respect to their own nationals*. . . ."[15] Wyatt and Dashwood cite Article 2(1)

10. Kon, op. cit. *supra* note 8, 90.

11. See e.g. the voluminous case law generated by the (vertical *and* horizontal) direct effect of Art. 141 EC on equal pay and equal treatment, starting with Case 43/75, *Defrenne* v. *SABENA* (No. 2), [1976] ECR 455.

12. See *Angonese*, *supra* note 2, para 34. On the wording of Art. 39 more generally, see Pickup, op. cit. *supra* note 8, at 154, who discusses also the somewhat open-ended wording of Art. 12 EC; that provision, despite early suggestions to the contrary, also demands a cross-border element, only then generating an obligation of ". . . complete equality of treatment between persons in a situation governed by Community law and nationals of the Member State in question." (Case C-122/96, *Saldanha and MTS Securities Corporation* v. *Hiross Holding AG*, [1997] ECR I-5325, para 25) Whether the absence of a national comparator in immigration cases involving Title IV EC will advance this traditional understanding of Art. 12 remains to be seen.

13. *Saunders*, para 9.

14. *Saunders*, Opinion of A.G. Warner, especially at 1142–4. On the substantive point, the A.G. upheld the legitimacy of the restriction in terms of public policy and the powers of the Member States in the criminal law context (see 1144–5).

15. *Saunders*, para 10 (emphasis added). The deferential tone adopted in terms of criminal competence has itself been criticized. Kon, has argued that "[i]t appears unduly restrictive . . . to state that the application of penal measures which exclusively deprive or restrict the freedom

of Directive 68/360 in this context, since it obliges Member States to allow their own nationals to leave their home State in order to work in another, thus generating some connection with the exercise of Community rights.[16] But the aspect of the decision which has become entrenched is its clear statement of the wholly internal rule, reaffirmed time and again thereafter.[17]

As noted at the outset, the area of immigration law and family reunification is one in which reverse discrimination can be seen most clearly to occur. In *Morson and Jhanjan*, for example, the applicants (both nationals of Surinam) were not able to invoke EC law in order to claim a right to reside in the Netherlands with their daughter and son respectively, both Netherlands nationals. Both applicants satisfied the criterion of dependency, but neither of their children had moved to another Member State to work. Drawing from the restrictive tenets of *Saunders*, the Court maintained that neither Article 12 nor Article 39 EC could be invoked; this conclusion stemmed from both the wording (although, as noted above, on arguably inconclusive logic) and purpose of both provisions, ". . . which is to assist in the abolition of all obstacles to the establishment of a common market in which the nationals of the Member States may move freely within the territory of those States in order to pursue their economic activities."[18] As introduced already, and discussed in detail below, whether this particular purpose can still be held to reflect the contemporary scope of EC law is far from certain. But it is ingrained, for now, that the requisite cross-border element cannot be provided by movement from a third country to a Member State; the Treaty can only come into play once the

of movement of a national worker in respect of acts committed within the territory of that state will always fall outside Community competence" Kon, op. cit. *supra* note 8, 90. The facts of both *Saunders* and, more recently, Case C-299/95, *Kremzow* v. *Austria*, [1997] ECR I-2629, meant that the Court did not have to address the substantive point in any meaningful manner; it is interesting to speculate, however, on how the Court might have dealt with *Kremzow*, in particular, had the applicant had a job offer in another Member State, for example. In a different context, see Case C-348/96, *Criminal Proceedings against Donatella Calfa*, [1999] ECR I-11, where the proportionality of the expulsion for life of a Community national from the territory of a Member State in which she had been a tourist was challenged – successfully – on the basis of her freedom to provide and receive services.

16. Arnull, Dashwood, Ross and Wyatt, *Wyatt and Dashwood's European Union Law*, 4th ed. (London, Sweet & Maxwell, 2000), p. 383; Directive 68/360 (abolition of restrictions on movement and workers for workers and their families) J.O. 1968 L 257/13. The implications and full extent of this right were developed recently in Case C-370/90, *R* v. *Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department*, [1992] ECR I-4265, discussed in detail below, and Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL* v. *Jean-Marc Bosman*, [1995] ECR I-4921 (in confirming that non-discriminatory obstacles to free movement came within the scope of Art. 39 EC).

17. Again, in the "classic" vein, see Case 35–36/82, *Morson and Jhanjan* v. *Netherlands*, [1982] ECR 3273, para 17 (". . . no factor linking them with any of the situations governed by Community law. . . ") and Case C-332/90, *Steen* v. *Deutsche Bundespost*, [1992] ECR I-341, para 9 (". . . confined in all respects within a single Member State. . . ").

18. *Morson and Jhanjan*, para 15.

facts involve a "second" Member State at least.[19] Moreover, the status of the "receiving" (static) Member State nationals – and thus, the wholly internal rule in itself – was considered by the Court not to have been affected by the introduction of EU citizenship.[20] On this point in *Uecker and Jacquet*, the Court reasoned as follows:

> "[C]itizenship of the Union . . . is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. Furthermore, Article [47] of the Treaty on European Union provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State."[21]

Another aspect of the wholly internal rule clarified subsequently is the condition that the cross-border element in any given case must be real, not just potential or hypothetical.[22]

The continuing ramifications of the *Saunders* legacy still generate a basic analytical question – what exactly *is* reverse discrimination? Pickup takes care to distinguish what he calls "harmonization discrimination", i.e. ". . . the discrimination which exists, in areas of Community law not yet subject to harmonizing legislation, because different Member States have diverging legislation."[23] The difference here, presumably, can be derived from the "not yet" aspect of harmonization discrimination. So, for reverse discrimination – which remains outwith the ambition of Community harmonization – is it simply that "home" nationals are being discriminated against because of their "home" nationality (a fairly ironic construction given the emphasis in Community law generally on outlawing discrimination of this kind)? Or is it not so much nationality that matters, as the mere act of movement? In *Kaur*, Advocate General Léger remarked that "[t]he Court's position in regard to internal situations is justified by the need to confine application of the Treaty provisions or the rules of secondary law resulting therefrom to situations involving certain extraneous factors, in particular situations characterized by

19. See, in addition to *Morson and Jhanjan*, Joined Cases C-64 & 65/96, *Land Nordrhein-Westfalen* v. *Kari Uecker; Vera Jacquet* v. *Land Nordrhein-Westfalen*, [1997] ECR I-3171 and Joined Cases C-95, 98 & 180/99, *Khalil and others*, [2001] ECR I-7413.

20. See *Uecker and Jacquet*, paras. 19, 22–23.

21. Ibid., para 23. The questions raised by – or, perhaps, outstanding because of – this interpretation will be discussed further in Section 3 below.

22. See Case 180/83, *Moser* v. *Land Baden-Württemberg*, [1984] ECR 2539, para 18 and Case C-299/95, *Kremzow* v. *Austria*, [1997] ECR I-2629, para 16.

23. Pickup, op. cit. *supra* note 8, 137.

the existence of cross-border elements."[24] And, as the Court emphasized as early as *Knoors*, it is perfectly possible for an individual to rely on EC law against his or her own Member State once a cross-border element has been generated in some way, so that the facts are not confined only to the home State.[25] Not all trans-frontier elements can successfully establish this link;[26] the ways in which it *can* be achieved are discussed more fully in Section 3 but, as in *Knoors* itself, a fairly non-controversial possibility is that of acquiring a professional qualification in another Member State.[27] Even this basic rule must be sited in the evolving character of ECJ case law, however, by result of which, as submitted below, a link with Community law can be established more easily yet more erratically; it was suggested by Advocate General Fennelly in *Angonese*, for example, that study *per se* which does not actually lead to a diploma or qualification might suffice to bring an individual's circumstances within the scope of the Treaty.[28]

Several commentators have addressed the character of reverse discrimination from a more normative perspective. In particular, Cannizzaro has suggested that the difference in treatment experienced here is "not *necessarily* based on nationality" but that this is "most frequently the case".[29] He goes on to outline the particular causal link between reverse discrimination and overlapping or concurring systems of competence.[30] And, connecting this

24. Case C-192/99, *The Queen and Secretary of State for the Home Department* ex parte *Kaur*, [2001] ECR I-1237, Opinion of A.G. Léger, para 24.

25. In *Knoors*, the Court, at para 24, reasoned as follows: "Although it is true that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article, [43] to 'nationals of a Member State' who wish to establish themselves 'in the territory of another Member State' cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of Community law, are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty." See also, the Opinion of A.G. Reischl, especially at p. 416. Commenting on the principle emanating from *Knoors* in a general sense, Pickup has described it as a "'half-measure', [which] irritates as much as it soothes", Pickup, op. cit. *supra* note 8, 154.

26. See note 1 *supra*.

27. See Case C-61/89, *Criminal Proceedings against Bouchoucha*, [1990] ECR I-3551, Case C-19/92, *Kraus* v. *Land Baden-Württemberg*, [1993] ECR I-1663 and Case C-234/97, *Fernández de Bobadilla* v. *Museo Nacional del Prado*, [1999] ECR I-4773. In Joined Cases C-225–227/95, *Kapasakalis, Skiathitis and Kougiankas* v. *Greek State*, [1998] ECR I-4239, the Court confirmed that Directive 89/48 on the mutual recognition of qualifications (O.J. 1989, L 19/16) did not apply to purely internal situations.

28. See *Angonese*, Opinion of A.G. Fennelly, especially at paras. 28 and 33.

29. Cannizzaro, "Producing 'reverse discrimination' through the exercise of EC competences", (1997) YEL, 29–46 at 29 (emphasis added).

30. Ibid., p. 33 et seq.

with the adherence of the Court to movement as the bedrock of Article 39 EC, he suggests that:

> "[i]t would be difficult to argue that the effectiveness of the EC right of free movement of workers required a difference in the legal status of foreign and national workers. . . Neither the Community norm nor the national norm would appear unlawful if considered independently. . . In other words, neither Community law nor national law intend to create a discrimination. That is only the effect of the existence of two concurring competences on the same subject."[31]

Poiares Maduro echoes this reasoning, writing that "States do not, in general, want to discriminate against their own nationals. Reverse discrimination normally occurs because EC law obliges States to treat nationals of other Member States in a way which – by reasons of their own policies and aims – they did not originally intend to treat their own nationals."[32] Viewed through this lens, there is no element of blame involved, on the part of either the Community or Member States. But what remains is the material difference in treatment; and if this is to be redressed, then responsibility, at least, must be accepted at one or both levels of Community governance. There is also a lingering incredulity attached to the fact that without the stimulus of movement, an individual's situation can be so wholly different; as noted at the outset, it is precisely the converse ease with which Community law *can* be triggered which sours the logic of leaving the rest aside.

At this point, then, we can point to the origin and entrenchment of the wholly internal rule; and yet already, there are some doubts as to its normative logic, even before proceeding to examine the very significant extent to which EC law on persons has matured. To sketch the boundaries of the internal market more completely, however, it is first useful to consider the rules in respect of the free movement of goods. There is no perfect conceptual symmetry across the Community freedoms. Looking at goods and workers, non-discriminatory obstacles to free movement do not necessarily infringe Article 28 EC, for example, but this is not the case for Article 39;[33] furthermore, Article 39 EC is horizontally directly effective, Article 28 is not (yet). But the wholly internal rule does apply also in respect of goods, in the sense that intra-Community trade must be at issue before the relevant Treaty provisions will

31. Ibid, p. 44.
32. Poiares Maduro, op. cit. *supra* note 8, p. 127.
33. Contrast the decision in Case C-267–268/91, *Criminal Proceedings against Keck and Mithouard*, [1993] ECR I-6097 with *Bosman*, cited *supra* note 16, and Case C-190/98, *Graf* v. *Filmoser Maschinenbau GmbH*, [2000] ECR I-493.

bite.[34] Here too, however, the persistence of the principle appears somewhat less than secure.[35] The authority usually cited here is *Pistre*, where the Court (contrary to the Opinion of A.G. Jacobs, who held the circumstances to be purely internal) reasoned that even where the facts of a case are confined to a single Member State, the application of a national measure may effect intra-Community trade where:

> ". . . the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods [because] [i]n such circumstances, the application of the measure, even if restricted to domestic producers, in itself creates and maintains a difference of treatment between those two categories of goods, hindering, at least potentially, intra-Community trade."[36]

This statement stands alone in terms of its breadth, with the Court in subsequent cases contriving its stance in terms of Article 234 EC.[37] In explanation, Oliver argues that the Court is not actually seeking to extend the scope of Article 28 to situations which are purely internal to a Member State (which he acknowledges would "fly in the face of the clear wording of the Treaty"[38]), but is instead ". . . simply stating that it will not decline to answer a request for a preliminary ruling on the interpretation of Article 28, even where the inter-state element is lacking in the instant case."[39] He submits that this

34. For discussion of this point in the aftermath of *Cassis*, see Kon, op. cit. *supra* note 8, 91–100 (Case 120/78, *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649).

35. On reverse discrimination and Art. 28 EC in particular, see Oliver, "Some further reflections on the scope of Articles 28–30 (ex 30–36) EC", 36 CML Rev., 783–806 at 783–8.

36. Joined Cases C-321–24/94, *Criminal Proceedings against Pistre, Barthes, Milhau and Oberti*, [1997] ECR I-2343. In the context of customs duties, the Court has been similarly keen to avoid reverse discrimination: see esp. Joined Cases C-363, 407-11/93, *Lancry* v. *Direction Générale des Souanes and others,* [1994] ECR I-3957, especially at paras. 25–31, including the statement that ". . . the very principle of a customs union covers all trade in goods [and] requires the free movement of goods generally, as opposed to inter-state trade alone, to be ensured within the Union." (para 29).

37. A.G. Jacobs also distinguished *Pistre* in his Opinion in Case C-312/98, *Schutzverband gegen Unwesen in der Wirtschaft eV* v. *Warsteiner Brauerei Haus Cramer GmbH & Co. KG*, [2000] ECR I-9087, at paras. 43–48, on the grounds that *Pistre* involved a "rather unusual element" given that reverse discrimination was unlawful under national law, which thus allowed the parties to rely (in an indirect way) on Art. 28 EC. This explanation certainly makes sense, but the Court did not see necessary to invoke this "unusual element" in its eventual judgment. More recently, see the Opinion of A.G. Jacobs in Case C-159/00, *Sapod Audic* v. *Eco-Emballages SA*, of 17 Jan. 2002, nyr, paras. 70–78. The point that reverse discrimination might be precluded by national law is returned to in Section 4 below, in the context of remedies.

38. Oliver, op. cit. *supra* note 35, 787.

39. Ibid.

approach was confirmed in the subsequent *Foie Gras* decision.[40] But this is a strategy that presents its own problems, problems which should not be underestimated. In the context of workers, the Court adopted a similar logic in *Angonese*, issuing its memorable declaration that Article 39(2) is horizontally directly effective, but doing so in a case where the EC connection was far from apparent.[41] In its eagerness to provide answers to preliminary references, even where an appreciable Community element is not likely to prove substantive, the ECJ transfers a considerable burden to the national courts – if the measure challenged is found to breach EC law, then it becomes more difficult to dismiss the proceedings at hand (especially, as occurred in *Angonese*, if the Advocate General raises the possibility that an extension of EC law, so bringing the applicant within the scope of the Treaty, might be conceivable). This latter scenario positively invites further national references in respect of the same cases, prolonging national proceedings both time-wise and financially when the question secondly to the fore could really have been dealt with first day. The catalytic character of ECJ judgments must also be borne in mind here.[42] The interaction between the ECJ and the national courts will be considered again in Section 4, in terms of remedies; but first, the evolution of EC law on persons will be explored more substantively.

40. Case C-184/96, *Commission* v. *France*, [1998] ECR I-6197, esp. at para 17. See also Case C-448/98, *Criminal Proceedings against Guimont*, [2000] ECR I-10663, paras. 19–23, and the discussion of this question by A.G. Saggio in particular, at paras. 6–8 (in contrast to the Court, the A.G. *did* consider that the facts of the case were purely internal, proceeding to address the substantive issue "just in case").

41. *Angonese*, *supra* note 2; see also note by Lane and Nic Shuibhne, 37 CML Rev., 1237–1247. More recently, in the context of the free movement of capital, see the decision in Joined Cases C-515 etc./99, *Reisch and others* v. *Bürgermeister der Landeshauptstadt Salzburg and ors*, 5 March 2002, nyr, especially at paras. 20–27; the Court draws directly from its reasoning in *Angonese* and *Guimont*, notwithstanding the very clear statement that the facts of the present case were undisputedly confined to a single Member State (in para 24). The *Angonese* preliminary reference reasoning has taken root also in respect of external relations (Case C-33/99, *Hassan Fahmi and M. Esmoris Cerdeiro-Pinedo Amado* v. *Bestuur van de Sociale Verzekeringsbank*, [2001] ECR I-2415) and environmental protection (Case C-510/99, *Criminal Proceedings against Tridon*, [2001] ECR I-7777).

42. On this point, in the context of goods, see Steyger, *National Traditions and European Community Law: Margarine and Marriage* (Aldershot, Dartmouth, 1997), p. 234, which includes the observation that: "It is not that easy to adjust the laws on goods partially, and only to impose different, usually lower, requirements on imported products, while continuing to impose higher standards on domestic products. Though in many situations the Member States are allowed to do so, they adjust their legislation completely, nevertheless."

3. The middle: Eroding the entrenchment

The thread running through this section is that of expansion – of progression, development and intensifying integration; three thematic divisions can, however, be made. First, the latitude attached to the concept of the Community worker in ECJ case law will be considered in a fairly general sense, introducing the idea that, notwithstanding the limitations of *Saunders*, the reality of establishing a cross-border element is not overly problematic. Second, the particular repercussions – both actual and prospective – of the Court's judgment in *Singh* will be considered. Finally, and perhaps most significantly, the ongoing judicial shading of EU citizenship will be addressed.

3.1. *The scope of Article 39 EC: More "almost external" than wholly internal?*

The typically generous approach of the ECJ to the definitional scope of Community workers is well established.[43] What concerns us here, however, is the more subtle liberality of the Court in determining that a given situation satisfies the cross-border dimension of that concept. As Pickup observed, well before EU citizenship or even the decision in *Singh*, the need to establish a connecting factor with Community law is ". . . an arbitrary distinction begging the question of what *degree* of connection is required."[44] Notably, he cautions that since this is a question of fact to be determined by national courts, there may be varying standards across the Member States, a point returned to in Section 4 in the context of remedies.

Overwhelmingly, the case law of the Court exhibits the movement thesis (rather than the "home discrimination" one); nationality of *a* Member State remains critical, but Article 39 – and, crucially, its derivative secondary legislation – can be relied on against an individual's home State so long as there exists *some* cross-border element from which to draw. For example, in *Scholz*, the plaintiff, of German origin but having acquired Italian nationality by marriage and residing in Italy, was deemed to come within the scope of Article 39 in respect of an employment competition for posts at an Italian university; the Court felt that "[a]ny Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom

43. The archetypal authorities here include Case 66/85, *Lawrie-Blum* v. *Land Baden-Württemberg*, [1986] ECR 2121 (general definition of worker), Case 53/81, *Levin* v. *Staatssecretaris van Justitie*, [1982] ECR 1035 (part-time work), Case 196/87, *Steymann* v. *Staatssecretaris van Justitie*, [1988] ECR 6159 (remuneration) and Case C-292/89, *R.* v. *Immigration Appeal Tribunal ex parte Antonissen*, [1991] ECR I-745 (job-seekers).

44. Pickup, op. cit. *supra* note 8, 156 (emphasis added).

of movement for workers and who has been employed in another Member State, falls within the scope of [the non-discrimination principle in Article 39 EC and Regulation 1612/68]."[45] In *Terhoeve*, the Court confirmed that ". . . Article [39 EC] and Article 7 of Regulation 1612/68 may be relied on by a worker against the Member State of which he is a national where he has resided and been employed in another Member State."[46] As is clearer from the decision in *Scholz*, employment *per se*, even without residence, in another Member State is what appears to be material (as discovered by Mr Werner in the context of establishment[47]). The judgment in *Boukhalfa* readily supports this interpretation;[48] here, it was decided that Article 39 EC (and the relevant provisions of Regulation 1612/68) applied to a Member State (Belgian) national resident in a non-member country (Algiers). The connecting factor with Community law was satisfied here because she was employed by another Member State (Germany) in its embassy in the non-member country, and her contract of employment was governed by German law. Thus, she was not actually required to have resided (or even ever been) in the employing Member State at any point. This generates an arguably slender connection to Community law, or, at least, a fairly creative one. The Court has also been generous to frontier workers, who reside in their home State but, crucially, work (or are established) in another, by characterizing the considerable potential of "social and tax advantages" (Art. 7(2) of Regulation 1612/68) as somewhat "exportable".[49]

In the context of social security, the wholly internal rule applies equally to situations coming within the scope of Regulation 1408/71.[50] But, once again, the scope for manoeuvre within the parameters of the limitation is ample. For example, in *Kulzer*, a German national who lived and worked in his own Member State was held to come within the scope of Regulation 1408/71 in

45. Case C-419/92, *Scholz* v. *Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECR I-505, para 9 (Regulation 1612/68 O.J. 1968 Sp. Ed. L 257/2, p. 475).

46. Case C-18/95, *FC Terhoeve* v. *Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland*, [1999] ECR I-345, para 29.

47. See note 1 *supra*, and Section 4 below; cf. the decisions in Case C-279/93, *Finanzamt Köln-Altstadt* v. *Schumacker*, [1995] ECR I-225 and Case C-80/94, *Wielockx* v. *Inspecteur der Directe Belastingen*, [1995] ECR I-2493.

48. Case C-214/94, *Boukhalfa* v. *Bundesrepublik Deutschland*, [1996] ECR I-2253, esp. at para 22.

49. See Case C-57/96, *Meints* v. *Minister van Landbouw, Natuurbeheer en Visserij*, [1997] ECR I-6689, paras. 49–50 and Case C-337/97, *Meeusen* v. *Hoofddirectie van de Informatie Beheer Groep*, [1999] ECR I-3289, paras. 25 (workers) and 30 (self-employed persons). The facts in *Meeusen* concerned the award of a study grant, an aspect of Community law now enmeshed with EU citizenship: see the landmark decision of the Court in Case C-184/99, *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, discussed below.

50. O.J. 1971, L 149/2 (as amended); see Case C-153/91, *Petit* v. *Office national des pensions*, [1992] ECR I-4973, para 10; this was confirmed in *Khalil*, para 71.

the context of family benefits, the requisite cross-border requirement being fulfilled by the fact that his daughter lived in France.[51] The personal scope of the Regulation has been addressed most recently in *Humer*; here, the Court cited *Kulzer* with approval, confirming that the "cross-border nexus" may legitimately be established by residence of the relevant (dependant) family member – and not necessarily the worker him/herself – in another Member State.[52] In particular, the Court pointed out that the purpose of Articles 73 and 74 of the Regulation is

> "... precisely to guarantee members of the family residing in a Member State other than the competent State the grant of the family benefits provided for by the applicable legislation.... [T]hose articles are intended to prevent Member States from making entitlement to and the mount of family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement...."[53]

In *Khalil*, the Spanish Government had contended that the decision in *Kulzer* was so broad as to remove the need for any "cross-border nexus" at all – a reading deemed incorrect, however, by the Advocate General and not discussed at all by the Court.[54]

Finally, the Court has also addressed the degree to which an individual's status as a migrant worker is retained after the employment relationship has ended. The particular questions thrown up in *Singh* are discussed separately below, but there are some more general principles at play here also. In *Meints*, for example, the Court, drawing from its earlier decision in *Lair*,[55] held that "... migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship."[56] In *Leclere and Deaconescu*, the Court consolidated its reasoning, stating that a former worker "... continues to be entitled to certain advantages acquired by virtue of his employment relationship; the principle of equal treatment requires that he be able to enjoy those advantages without any condition that

51. Case C-194/96, *Kulzer* v. *Freistaat Bayern*, [1998] ECR I-895.

52. Case C-255/99 *Humer*, judgment of 5 Feb. 2002, nyr, para 48.

53. Ibid, paras. 39–40, citing Case C-12/89, *Gatto*, [1989] ECR I-557, summary publication, and Joined Cases C-245 & 312/94, *Hoever and Zachow*, [1996] ECR I-4895 at para 34. The "deterrent" aspect of this extract is especially relevant given the decision in *Singh* and is discussed further below.

54. See the Opinion of A.G. Jacobs in *Khalil*, at para 66 et seq.

55. Case 39/86, *Lair* v. *Universität Hannover*, [1988] ECR 3161, para 36.

56. *Meints*, para 40; see also Case C-85/96, *Martínez Sala* v. *Freistaat Bayern*, [1998] ECR I-2691, para 32.

he reside in the territory of the competent Member State."[57] The Court noted expressly, however, that new rights, having no connection to the person's former occupation, cannot be acquired under EC law; any lingering rights must be derived from the professional activity previously undertaken.[58] The beneficial implications of this for family members of the worker were seen as early, for example, as *Moritz*;[59] but the limitations to the principle – highlighting the Court's warning that no "new" rights can be created – were to the fore more recently in *Fahmi*.[60]

Overall, the case law discussed in this section indicates that while the basic premise of the wholly internal rule still holds sway, considerable dents have been made in its effect because of the broad scope attributed to Article 39 EC and its implementing legislation. Again, however, this begs the question of circumstances deemed *not* to trigger the vital connecting factor seeming arbitrarily construed or excluded. Against this general backdrop, the particular implications of the decision in *Singh* – which have since been, and indeed are poised still to be, brought to fruition – will now be outlined.

3.2. *A door ajar? The decision in Singh*

The basic premise of *Singh* can be linked, in the first instance, to an issue introduced already above – to what extent can a shield of EC protection still attach even after a worker has returned to his/her home Member State? Specifically in this case, the third country national (Indian) spouse of a British national was able to employ Community law to derive a right of residence in the United Kingdom, on the basis that his spouse had previously exercised her right to free movement (and been accompanied there by her spouse). The Court of Justice reaffirmed the need for the applicant to establish a connection between his circumstances and Community law; but the link ultimately accepted marks something of an advance – a welcome advance in terms of providing the greatest degree of protection possible for individuals, but an arguably dubious one from the perspectives of coherence and of the questions provoked rather than answered by the judgment.

The applicant was challenging a (national) decision that refused him leave to remain indefinitely in the United Kingdom.[61] Mrs Singh had exercised

57. Case C-43/99, *Leclere and Deaconescu* v. *Caisse nationale des prestations familiales*, [2001] ECR I-4265, para 58.

58. Ibid., paras. 59 and 61.

59. Cases 389 & 390/87, *Echternach and Moritz* v. *Netherlands Ministry for Education and Science*, [1989] ECR 723.

60. See Case C-33/99, *Hassan Fahmi and M. Esmoris Cerdeiro-Pinedo Amado* v. *Bestuur van de Sociale Verzekeringsbank*, [2001] ECR I-2415.

61. The decision of the Immigration Appeal Tribunal hinged on the fact that the Singhs were about to be divorced; a decree *nisi* of divorce had been pronounced at the material time,

her Treaty right to work in another Member State and was accompanied there by her husband (in accordance with Directive 68/360[62]). Both returned subsequently to the United Kingdom where Mrs Singh re-established herself (in her own Member State) as a self-employed person within the meaning of Article 43 EC; the question being considered by the Court of Justice was whether her husband could enjoy a right of residence with her in the UK in accordance with Directive 73/148.[63] The United Kingdom argued strongly that, at this point in time, the Singhs' situation was back within the competence of the national authorities, but the ECJ responded as follows:

> "[T]his case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles [39 and 43] of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her own country of origin to the entry and residence of her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State."[64]

The Court here frowns on policies which yield a deterrent national climate, biased *against* the exercise of Treaty rights. Would its answer have been different had the couple *not* been self-employed within the meaning (for Mrs Singh) of Article 43 EC on their return to the United Kingdom? The fact that both Articles 39 and 43 EC were relevant to their situation (albeit at different times) seems, in a cumulative sense, to be significant and both provisions were conjoined by the Court in *Singh*; but that does not necessarily presage a situation involving, for example, workers only. It is true that Article 43 contains a possible textual loophole, in that it refers merely to "establishment of nationals of *a* Member State in the territory of *another* Member State", which could arguably cover Mrs. Singh's returning from Germany to the United Kingdom;[65] but the Court did not hinge its decision on, or even raise, this point.

It is instead the requirement of movement – even at some point in the past – which is stressed overall. And significantly, Advocate General Tesauro felt

with the marriage subsequently dissolved. But for the period of time under consideration in respect of the Art. 234 reference, the Singhs were considered by the ECJ still to be lawfully married (see para 12).

62. JO 1968 L 257/13.
63. O.J. 1973, L 172/14.
64. *Singh*, paras. 23–4.
65. On this point, see *Auer*, para 20 et seq.; cf. the Opinion of A.G. Warner at 455. See more recently, the decision in *Kraus*, cited *supra* note 27.

that there was nothing "paradoxical or illogical" about the fact that someone who could not demonstrate a connection with Community law would be required to leave his/her Member State in order to activate Community law rights (here, of entry and residence).[66] Cannizzaro takes quite a different view of things, however. He finds it "difficult to perceive the rationale of a solution that would impose restraints on Member States in the treatment of some citizens only, depending on a very formal element, like that of having once – and perhaps in a situation unconnected with the case at stake – availed themselves of the rights and freedoms of the Treaty."[67] In the first place, the emphasis in *Singh* on the need to avoid discouraging the exercise of Community rights does not really fit with the (arguably more specific) needs of resettled workers after returning to their home States. But two linked considerations remain more dangerously unclear: first, the threshold at which it will be accepted that a Community right has been (sufficiently) exercised and, second, the extent to which it will be held to have a bearing on the circumstances that come subsequently before the Court.[68]

And, inevitably, the question arises: if the logic of *Singh* is potentially infinite, how can it be said that movement retains any credibility as a prerequisite at all? Johnson and O'Keeffe remarked that the next step in a post-*Singh* mood was that ". . . even those Community nationals who have never exercised freedom of movement could still challenge national rules which were incompatible with the spirit of free movement envisaged by the Treaty as being deterrents to mobility."[69] Perhaps just one step behind this hypothesis, the very least that an individual is required to do/move in order to activate

66. *Singh*, Opinion of A.G. Tesauro, para 15.

67. He goes on to say "If we apply this argument, we must conclude that a subject who has exercised the right to free movement and worked abroad for a certain time will enjoy, once back in his home country, every right afforded by EC law relating to free movement. This conclusion could be justified only by a need to provide citizens of the national state with minimal standards in order to allow them to come back and stay in their home country on a basis of equality with foreign workers. But if we adopt this line of reasoning, there is logically no ground for excluding from the enjoyment of the same provisions those citizens who *never* exercised the right of free movement. . . ." Cannizzaro, op. cit. *supra* note 29, 43 (emphasis added).

68. Lane and Nic Shuibhne have framed the dilemma as follows: "There *was* a fair and fairly apparent Community element in the Singhs' adventures: they had lived and worked together (so exercising a Treaty right) in Germany and they co-owned the undertaking established in the UK (although they were in the final throes of a divorce). But how far can the principle extend? Has a Belgian who went on holiday to Crete 15 years ago, or from time to time watches TF1 on cable television – both involving the exercise of a Community right – earned the right to invoke Articles 39 or 43 and their attendant legislation in Belgium?", Lane and Nic Shuibhne, op. cit. *supra* note 41, 1242.

69. Johnson and O'Keeffe, "From discrimination to obstacles to free movement: Recent developments concerning the free movement of workers 1989–1994", 31 CML Rev., 1313–1346 at 1338.

Community rights is what, in essence, calls now to be clarified in *Carpenter*, currently pending before the Court and discussed in Section 4 below.[70] And even the plausible, if radical, follow-on sketched by Johnson and O'Keeffe is not so remote as might be assumed (again, discussed in Section 4, in light of recent Commission proposals).

In the specific domain of residence claims, the potential for abuse – thinking particularly of marriages of convenience and of brief stays in other Member States with the intention purely of generating a shield of Community rights upon return – was highlighted in *Singh* by the UK government. These arguments were accorded legitimacy by the Advocate General; but both he, and ultimately the Court, did not feel that the concern was sufficiently grave to justify a more restrictive result overall.[71] Despite the reassurances of the Court, this must surely involve sensitive inquiries at national level; and, calling into question the comforts offered by *Singh*, the Immigration Appeal Tribunal has recently referred more direct questions on this point to the Court of Justice.[72] Some cautioning against a broad application of *Singh* could be implied from Advocate General Fennelly's remarks in *Angonese*, in his observation that ". . . short educational exchanges or even periods of as little as one day spent abroad as a tourist could, *quite arbitrarily*, enable a person to invoke

70. Case C-60/00, *Carpenter* v. *Secretary of State for the Home Department*, pending; the Opinion of A.G. Stix-Hackl was delivered on 13 Sept. 2001.

71. *Singh*, para 24, which states that ". . . the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse." (citing para 25 of *Knoors* and para 14 of *Bouchoucha*) See also, the Opinion of A.G. Tesauro, para 14. On the submissions of the UK government, and the significance of the fact that they ultimately failed, see White, "A fresh look at reverse discrimination", 18 EL Rev. (1993), 527–532.

72. Case C-109/01, *Secretary of State for the Home Department* v. *Hacene Akrich*, pending (see O.J. 2001, C 150/12). The questions referred are: "Where a national of a Member State is married to a third country national who does not qualify under national legislation to enter or reside in that Member State, and moves to another Member State with the non-national spouse, intending to exercise Community law rights by working there for only a limited period of time in order thereafter to claim the benefit of Community law rights when returning to the Member State of nationality together with the non-national spouse: (1) is the Member State of nationality entitled to regard the intention of the couple, when moving to the other Member State, to claim the benefit of Community law rights when returning to the Member State of nationality, notwithstanding the non-national spouse's lack of qualification under national legislation, as a reliance on Community law in order to evade the application of national legislation; and (2) if so, is the Member State of nationality entitled to refuse: a) to revoke any preliminary obstacle to the entry of the non-national spouse into that Member State (on the facts of this case an outstanding deportation order); and b) to accord the non-national spouse a right of entry into its territory?" In the context of non-binding guidelines, see the Council Resolution on measures to be adopted on the combating of marriages of convenience, 1997 O.J. C/382/1.

Community-law rights against his own Member State."[73] So it would seem necessary that some degree of connection between the rights enjoyed abroad and those claimed upon return could be established – mirroring the approach seen above in *Meints*, *Leclere and Deaconescu* and *Fahmi*. But this was not addressed directly by the Court – either in *Singh* or in *Angonese*.[74] And it is arguable equally that drawing a line under the activation of Community rights at the point implied by Advocate General Fennelly is itself "arbitrary", especially when the breadth attached to the provision and receipt of services in *Bickel and Franz*[75] and the case law on citizenship (discussed below) are brought into the equation. It is precisely the scope of services that falls now to be refined in *Carpenter*. But, as White remarked in the immediate aftermath of *Singh*, the potential impact of that judgment on reverse discrimination and the wholly internal rule has become all the more urgent in light of EU citizenship;[76] and so, the extent to which the interim passage of time has proved him all the more prophetic will first be addressed.

3.3. *A door (almost) open: The developing scope of EU citizenship*

The introduction and initial development of the EC Treaty citizenship provisions are well documented.[77] But the key judgments in this context, *Martínez Sala*, *Bickel and Franz*, *Wijsenbeek*[78] and *Grzelczyk*, can be as frustratingly vague as they are illuminating. It is not the intention here simply to describe these cases in a general sense. But, as noted at the outset, the fundamental regulatory shift effected by citizenship strongly challenges the legitimacy of maintaining the wholly internal rule; in particular, it highlights both the deepening consequences of movement and the potentially inferior position of those who stay still. As will become clear, however, the implications of citizenship are not yet straightforward or complete, thinking broadly of the persisting

73. *Angonese*, Opinion of A.G. Fennelly, para 9 (emphasis added).

74. In *Singh*, A.G. Tesauro did raise this question – see para 5 of his Opinion in particular, in which he discusses the need to establish a "logical nexus" between the exercise of movement and the rights on which the worker seeks subsequently to rely. But the extent to which his comments remain valid in light of recent case law on citizenship – which has arguably severed the "logical nexus" between personal and material scope – is discussed in Section 3.3.2. below.

75. Case C-274/96, *Criminal Proceedings against Bickel and Franz*, [1998] ECR I-7637 (esp. at para, 15; see also the Opinion of A.G. Jacobs, paras. 16–21).

76. White, op. cit. *supra* note 71, 532.

77. See esp. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (The Hague, Kluwer Law International, 1996); Fries and Shaw, "Citizenship of the Union: First steps in the European Court of Justice", 4 EPL (1998), 533–559; O'Leary, "Putting flesh on the bones of European Union citizenship", 24 EL Rev. (1999), 68–79; and Toner, "Judicial interpretation of European Union citizenship – Transformation or consolidation?", 7 MJ (2000), 158–182.

78. Case C-378/97, *Criminal Proceedings against Wijsenbeek*, [1999] ECR I-6207.

ambiguity surrounding Article 18(1) EC and the balance that requires still to be struck between its potential and limitations.

3.3.1. *Framing EU Citizenship: Thou Shalt Move*

The initial criterion of access to EU citizenship is that of nationality. Basically, an individual must have the nationality of any of the Member States – the determination of which remains within national competence[79] – before the panorama of EU citizenship can open up. The second criterion is movement.[80] Drawing from case law on Article 39 EC, it has already been argued that the requirement of movement can be relatively undemanding in reality; in the domain of citizenship, the decisions in *Bickel and Franz* and *Wijsenbeek* have lessened this burden all the more. Both cases relate primarily to one key aspect of citizenship: the right to move within the territory of the Member States, the realization of which does not drain Member State reserves (financial and otherwise) to anything like the extent implied by the altogether more comprehensive right of residence. Despite the prescriptive phrasing at the beginning of Article 18(1) EC – "Every citizen of the Union *shall have the right* to move and reside freely within the territory of the Member States. . . " (reproduced in Art. 45(1) of the EU Charter of Fundamental Rights) – Toner remarks on the residual nature of citizenship in the early case law of the Court.[81] The alternative, though expansive, interpretation of services in *Bickel* is classically illustrative here.[82] In *Wijsenbeek*, the Court seemed more open to exploiting the potential of Article 18(1) without needing the crutch of another Treaty freedom;[83] and in this way, given the facts of the case, the Court distilled the requirement of *movement* down to its purest form: if you cross a border, you activate EC law and, more precisely, the principle of equal treatment – it truly seemed as simple as that, with no discussion of economic activity of any kind or even of any meaningful connection between

79. In general terms, this reserved power does not seem to have been eroded, but Hall traces something of a Community intrusion into this supposedly reserved domestic competence: Hall, "Loss of Union citizenship in breach of fundamental rights", 21 EL Rev. (1996), 129–143; see Case 21/74, *Airola* v. *Commission*, [1975] ECR 221, paras. 10–11 and Case C-369/90, *Mario Vicente Micheletti and others* v. *Delegación del Gobierno en Cantabria*, [1992] ECR I-4239, para 10. The activist approach evident in these decisions contrasts, however, with the more qualified interpretation in *Kaur* (see esp. paras. 22–26).

80. Excepting Art. 21 EC (right to petition the European Parliament, apply to the European Ombudsman and write to the EC institutions (and receive a reply) in any of the languages mentioned in Art. 314 EC).

81. Toner, op. cit. *supra* note 77, 172–3; she draws attention also to the reticence of the Court when compared with the more ambitious opinions of some of its advocates general (see 174–5).

82. See note 75 *supra*; essentially, the Court created an interpretation via which almost any cross-border activity could involve the receipt of services and come, as a result, within the scope of the EC law principle of equal treatment.

83. *Wijsenbeek*, esp. at paras. 22 and 41.

the individual (or his/her circumstances) and the host Member State. The mere presence of an EU citizen in any Member State other than his/her own thus generates, at least, a basic obligation of equal treatment *vis-à-vis* the host State's own nationals (the actual extent of which being something of another matter, however, as discussed immediately below); but the presence of that citizen in his/her own Member State *per se* does not generate any EC obligations at all, outwith the specific contexts of sex discrimination and Article 21 EC (and the rules on competition law).

3.3.2. *Taking things further: Exploring (and limiting) residence*

The case law relating to residence rights – notably *Martínez Sala* and *Grzelczyk* – is tied more to the second phrase of Article 18(1) ("... subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect") and, more specifically, to the conditions for lawful residence in another Member State laid down in the so-called residence directives i.e. adequate sickness insurance and sufficient resources to avoid becoming a burden on the social assistance system of the host Member State.[84] But a live issue before the Court of Justice at present is the extent to which a state must take responsibility for the nationals of other EC Member States resident in their territories – not, as was traditionally the case, because of the individual's status as a worker or self-employed person, but in a more human capacity, because of the status of citizenship. In *Martínez Sala*, the entitlement of a Spanish national residing in Germany to a child-raising allowance, on the same footing as German nationals, was derived directly from her status as an EU citizen, notwithstanding the fact that she was drawing from German social security; in *Grzelczyk*, a French national studying in Belgium was, as an EU citizen, found to be entitled to a national social assistance payment, again on the same basis as Belgian nationals. How were these applicants able to bring their circumstances within the scope of the Treaty when both were clearly outside what might be termed its financial scope, being patently without "sufficient resources"? In other words, to what do the "conditions and limitations" in Article 18(1) actually refer?

In their submissions to the Court, many of the Member States have protested at one time or another – largely, "... motivated by the fear of excessive influxes of unemployed persons towards more generous social assistance schemes..."[85] – that Article 18(1) was not intended to confer any new rights

84. See Directive 90/364, O.J. 1990, L 180/26, Art. 1(1); Directive 90/365, O.J. 1990, L 180/28, Art. 1(1); and Directive 93/96, O.J. 1993, L 317/59, Art. 1. In *Wijsenbeek*, the Court did address the fact that limitations may also be attached, legitimately, to the right simply to move to other States (see paras. 41–45).

85. Toner, op. cit. *supra* note 77, 165.

of movement and/or residence.[86] But the sum of the four key citizenship judgments does, at least, indicate that EC law has moved somewhat beyond the labels of work, establishment and services, severing a very fundamental connection between the personal and material scope of the Treaty.[87] It is this construction that might lead us to revisit the case of Mr Werner; as O'Leary has observed, "[q]uite apart from his involvement in an economic activity in his MS of origin, he was exercising his constitutional right to reside in a MS other than his own pursuant to Article [18]."[88] Moreover, the Commission is likely to propose significant expansion (or arguably, codification) of the scope of "social and tax advantages" in the context of reforming Regulation 1612/68.[89] In any event, it seems clear that Article 18(1) cannot be limited by the Treaty (and secondary legislation) provisions governing movement and residence in the context of economic activity. The continuing point of debate hinges on the more general limitations found in the residence directives and, specifically, on the criteria of sickness insurance and sufficient resources. The directives pre-date the introduction of EU citizenship, but they do relate to non-economic movement and residence; can they continue to limit the movement and residence rights generated by Article 18(1)?

Only the Court of First Instance has dealt with this question head-on. In *Kucklenz-Winter*, it held that what was then Article 8a EC was, as is clearly evident from the wording of the provision, subject to limitations and conditions; critically, the Court referred "in particular" to the residence directive criteria.[90] The Court of Justice, on the other hand, has been expressly

86. These efforts persisted even after *Martínez Sala* (see esp. para 22 of *Grzelczyk*); see also, the discussion by A.G. Geelhoed in Case C-413/99, *Baumbast and R* v. *Secretary of State for the Home Department*, pending, Opinion delivered on 5 July 2001, especially at para 96 et seq. and discussed in section 4 below. In terms of the national courts, Toner (op. cit. *supra* note 77, 163) refers e.g. to *R* v. *Secretary of State for the Home Department,* ex parte *Vitale*, [1996] All ER (EC) 461, in which the English Court of Appeal felt that it was so obvious that the residence directive conditions still applied, the question did not even merit a reference to the ECJ.

87. See, in particular, *Martínez Sala*, paras. 61–64.

88. O'Leary, *The Evolving*. . . , op. cit. *supra* note 77, p. 277.

89. In 1998, the Commission did present a proposal for amendment of Regulation 1612/68 (O.J. 1998 C 344/7) but it was never discussed by the Council; at the hearing in *Baumbast*, the Commission stated that a new proposal in this vein was "circulating in its departments" (see the Opinion of A.G. Geelhoed, para 30). In its earlier proposal, the Commission extended coverage of Art. 7(2) to "financial, fiscal, social, cultural and other advantages". On one argument, however, this may simply reflect the breadth already accorded to the existing provision in the case law.

90. Case T-66/95, *Hedwig Kuchlenz-Winter* v. *Commission*, [1997] ECR II-637, para 47. The sickness insurance, rather than sufficient resources, condition was under consideration in this particular case. The applicant's appeal (Case C-228/97, [1998] ECR I-6047 was dismissed by the ECJ by order, as manifestly inadmissible and unfounded (essentially, no new arguments were considered to have been raised).

evasive on the same point. In *Martínez Sala*, the Court (probably with some relief) pointed out that ". . . in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article [18 EC] in order to obtain a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorized to reside there, although she has been refused a residence permit."[91] In other words, Mrs Martínez Sala's (nationally accepted) lawful residence in Germany was taken as a starting point for the application of equal treatment; the Court did not assess whether she could derive any residence rights *per se* from the citizenship provisions and, therefore, did not have to address substantively the fact that she did not have sufficient resources – or even, whether this was even still relevant, a matter upon which some doubt was cast by Advocate General La Pergola:

> "That legislation was adopted by the Council to cover situations in which citizens did not enjoy a right of residence under other provisions of Community law. Now, however, we have Article [18] of the Treaty. The right to move and reside freely throughout the whole of the Union is enshrined in an act of primary law and does not exist or cease to exist depending on whether or not it has been made subject to limitations under other provisions of Community law, including secondary legislation. The limitations provided for in Article [18] itself concern the actual exercise but not the existence of the right. Directive 90/364 continues to regulate, *if at all*, the conditions governing enjoyment of the freedom of movement laid down in the Treaty."[92]

The result achieved in *Wijsenbeek* reflects this logic; yes, Article 18(1) confers a right of free movement, but one subject to some limitations. And yet, the basic question remains: *what* limitations exactly? The recent decision in *Grzelczyk* seems to compound rather than relieve the uncertainty. Here, as noted above, a French student studying in Belgium was found (in his fourth year of study) to be entitled to receipt of a minimum subsistence allowance paid by the Belgian State (the "minimex"), on the basis that students of Belgian nationality were so entitled. It had already been decided that the minimex constituted a social advantage within the meaning of Regulation 1612/68;[93] and, of course, it was no longer necessary, since *Martínez Sala*, actually to be a worker for that purpose. More than in *Martínez Sala*, however, the Court had to confront the limitations of citizenship in *Grzelczyk*. Once

91. *Martínez Sala*, para 60; the applicant's right to reside in Germany stemmed from Germany's obligations under the European Convention on Social and Medical Assistance (1953; see paras. 11, and 13–14 of the judgment).

92. *Martínez Sala*, Opinion of A.G. La Pergola, para 18 (emphasis added).

93. *Grzelczyk*, para 27, citing Case 249/83, *Hoeckx* v. *Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout*, [1985] ECR 973.

again, the applicant no longer satisfied the sufficient resources condition laid down in (for his purposes, as a student) Directive 93/96; moreover, Article 3 of that Directive states expressly that the Directive does not ". . . establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence." The Court reflected, somewhat lyrically, that "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality."[94] In a passage of striking simplicity, the Court then remarked that while Article 3 of Directive 93/96 does not establish an entitlement to maintenance grants, ". . . there are no provisions . . . that preclude those to whom it applies from receiving such benefits."[95]

But somehow, the parts of *Grzelczyk* do not add up to a very coherent whole; if it is accepted that a right of residence for students can be derived from the Treaty, as confirmed by the Court in *Lair*, that right was then codified – as opposed to created – by Directive 93/96. But if citizenship transcends the need to come within the scope of the Treaty *ratione personae* in any particular capacity in the first place, then why is it that the Court still addresses Directive 93/96 at all? Moreover, the way in which the sufficient resources condition is addressed in substantive terms is more fudged than reasoned; it is difficult to decipher the Court's reasoning here and to determine exactly when non-satisfaction of the sufficient resources condition could actually cause a right of residence to be withdrawn.[96] A special distinction seems also to have been drawn for the category of EU citizens who are students, but this doesn't really fit with the "fundamental status" of all free movers the Court had earlier extolled.

Advocate General Alber does refer to an alternative way of looking at citizenship, submitted, in *Grzelczyk*, by the Portuguese Government:

> "Citizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic factors which had underlain the EC Treaty. The conditions on which freedom of movement may depend are now no longer economic in nature, as they still were in the 1990 directives. The only 'limitations and conditions' attached to freedom of movement now are those imposed on grounds of public policy, public security and public health."[97]

94. *Grzelczyk*, para 31, the Court here presumably realizing a beyond work/establishment/services ethos, and not one that calls for the erosion of national status and nationality *per se*.

95. Ibid., para 39; see also, the Opinion of A.G. Alber, para 109. In this context, the Court noted (paras. 34–5) that the citizenship provisions have very probably reversed the Court's earlier position in Case 197/86, *Brown* v. *Secretary of State for Scotland*, [1988] ECR 3205.

96. *Grzelczyk*, paras. 40–45.

97. Ibid., Opinion of A.G. Alber, para 52.

Of course, taking that argument to its logical conclusion, even the grounds specified in that passage might not necessarily/automatically apply, tied, as they currently are, to the exercise of economic activity. But the essential premise is that the residence directives, pre-dating a right enshrined in the Treaty, cannot limit that subsequent right; any "limitations and conditions" envisaged at Maastricht must be enacted on the basis of or directed specifically at Article 18(1) itself. This, quite simply, did not happen, and the implications of the legal vacuum existing in the interim – which generates completely unfettered rights of movement and residence – are simply enormous from the perspective of the Member States, especially, but not exclusively, in financial terms. But surely the Portuguese interpretation makes more *legal* sense? At the very least, it certainly provides yet another opportunity to reflect on what EU citizenship *should* mean.[98]

3.3.3. *What the Commission did next?*

The Commission has recently tabled proposals that attempt both to clarify and develop the right to reside in another Member State.[99] Stemming from the 1998 recommendations of the high-level panel on the free movement of persons,[100] the Commission has proposed *inter alia* a sweeping revision which would replace the present sectoral and contextually specific legislative framework with a single set of rules on freedom of movement for all citizens of the Union and their families – irrespective of the purpose for which they have moved to another Member State and, at least in terms of being contained in a single legal instrument, irrespective of the *nature* (i.e. economic or otherwise) of that purpose.[101] The rationale behind this approach is drawn from the "... new legal and political environment established by citizenship of the Union."[102] The proposed directive does distinguish between economic and non-economic activity by retaining the sickness insurance and sufficient resources criteria for the latter; however, it confines these restrictions to the first four years of residence in the host State and, thereafter, seeks

98. O'Leary has argued that "[i]f, [equal treatment and complete free movement] are only extended under insulated economic conditions protective of welfare benefits in the host Member States... then it is clear that Community citizenship offers little which is not available under the present free movement regime." (*The Evolving*... op. cit. *supra* note 77, p. 99)

99. COM (2001) 257 final.

100. Adopted on 1 July 1998; see the Commission's review of the panel's recommendations in COM (1998) 403.

101. This means that, in effect, the new directive would delete Arts. 10 and 11 of Regulation 1612/68, and would repeal entirely Regulation 1251/70 (JO 1970, L 142/24), Directives 64/221 (derogation on grounds of public policy, security and health, JO 1964, 850), 68/360, 73/148 (abolition of restrictions on movement and residence in respect of establishment and services, O.J. 1973, L 172/14), 75/34 (right to remain after self-employment, O.J. 1975, L 14/10, 90/364, 90/365 and 93/96.

102. COM (2001) 257 final, para 1.3 of the explanatory memorandum.

to create a new, permanent right of residence – no longer subject to financial conditions and ensuring "virtually complete equality of treatment with nationals".[103] This is something of a hybrid between the residence directives and the Portuguese suggestion in *Grzelczyk*, allowing (by temporal means) for the creation of a substantive connection between an EU citizen and a host State but removing the indefinite character of the residence directive criteria. Critically, it is made absolutely clear in the explanatory memorandum that "[a]quisition of the right of permanent residence entails a series of important additional rights, *such as access to social welfare in the host Member State* for all categories of persons benefiting from the directive and *immunity from expulsion* from the territory of the Member State of residence."[104] Rather curiously, however, the Commission had taken its first steps in respect of the category of Union citizens who have never moved at all not in this draft directive, so firmly rooted in citizenship and equality of treatment, but in a measure presented via Title IV EC, discussed below.

Reflecting rather than refining the Court's approach in *Grzelczyk*, the proposed directive takes a slightly more complex approach to the residence rights of students – they are listed as a separate category in Article 7 of the draft directive, which would indicate initially that the sickness insurance and sufficient resources criteria do not actually apply to them; but, in Article 8(4), these conditions are reinstated.[105] Significantly, Article 21(2) reiterates the statement in Directive 93/96 that residence in a host Member State for purposes of receiving education does not oblige that State to award maintenance grants. But remarks by the Commission in this context are as confusing as those of the Court in *Grzelczyk*, attempting to secure the Directive 93/96 position and yet to allow the impact of citizenship subtly to filter through and affect it:

> "Maintenance grants count as a social assistance in the broad sense of the term and, therefore, students are not eligible for it under the terms of this Directive, since they are required to assure the relevant national authorities that they have sufficient resources to avoid becoming a burden on the public finances of the host Member State. . . Nonetheless, it should not be forgotten that . . . students may not be discriminated against in other fields on the grounds of nationality, such as when it comes to grants other

103. Ibid., Art. 14 of the draft directive; see also, paras. 2.1–2.2 of the explanatory memorandum.

104. Ibid., p. 17 (emphasis added).

105. The new right of permanent residence would be especially meaningful for students who acquire it after completing a four-year course of education in the host State, at which point the current residence directive conditions would cease to apply, allowing the (former) students to stay on in the host State with entitlements to social security on the same basis as home nationals while, for example, looking for work.

> than maintenance grants or medium-term loans with special low interest rates for students."[106]

If anything, however, the decision in *Grzelczyk* goes even further, already extending the principle of non-discrimination to include social assistance. Because it can no longer be said so firmly that ". . . it is a matter for the host Member State to decide whether it will extend social assistance provision or sickness insurance coverage to persons not engaged in gainful activity, or maintenance grants to Union citizens coming to study on its territory."[107]

Until the Commission's proposals translate into legal obligations, however, the residence directives still provide the key. The Court has never stated outright that the directives no longer apply; its decisions do imply their continuing effect, since the Court has actually tried to deal with, albeit to a very limited extent, the substance of the sufficient resources condition. The advocates general have been much more explicit in their views, with more recent opinions indicating more clearly than before the view that the residence directive conditions surely restrict the substance of Article 18(1) EC.[108] Perhaps all that can really be said on this particular point is that the scope of EU citizenship is far from settled. What can be said more assertively, however, is that the decisions in *Martínez Sala* and – even more acutely – *Grzelczyk* pierce the preserve of national social security competence to an unprecedented degree; and the repercussions of this, no doubt, cannot yet fully be appreciated. In the process, the extent to which movement to and/or residence in another Member State bears on an individual's treatment thereafter has undergone radical expansion; and so, yet again, the evolution of EC law affecting persons – via citizenship more specifically – reveals a chasm which can be bridged only by movement. As noted in section 2 above, the Court was adamant in *Uecker and Jacquet* that the introduction of citizenship had not displaced the need to establish a connecting factor with Community law in any given case; indeed, the legitimacy of reverse discrimination as a corollary was confirmed plainly by the Advocate General.[109] Toner criticizes the narrow attitude which manifests itself throughout that decision, however, arguing that the Court simply did not take on board the fundamentally different opportunities created by EU

106. COM (2001) 257 final, p. 18.

107. Ibid., p. 29 (recital 19 of the preamble to the draft directive).

108. See esp. the Opinions of A.G. Alber in *Grzelczyk*, para 122 and A.G. Geelhoed in *Baumbast*, para 114.

109. *Uecker and Jacquet*, Opinion of A.G. Fennelly, especially at para 25, where he observed that "[t]here is . . . nothing in the Treaty which would prevent a Member State applying to a situation which is purely internal and therefore, outside the scope of Community law, a national provision whose application to a situation governed by Community law has been held to be incompatible with the Treaty."

citizenship.[110] Toner's central thesis mirrors the thread of argument running throughout this paper; she locates the debate squarely in the discourse of citizenship – or, more properly, in a meaningful version of that concept. It is a position all the more amplified by the decision in *Grzelczyk*. And so, the requirement that someone must leave their own Member State in order to trigger the advantages of Community law, viewed against strenuous Community promotion of common citizenship bonds, seems, quite simply, to make less sense than ever.

4. And the end?

The decisions in *Kulzer* or *Singh* or *Grzelczyk* have not proven to constitute breaking points, although they did steer EC law towards a definite threshold. The wholly internal rule seems as a result to be a shell of its *Saunders* self. The decision in *Uecker and Jacquet* jars even with *Singh*, but it sits all the more uneasily with the ascent of EU citizenship, which seems gradually to be progressing the scope of EC law beyond work, beyond establishment and beyond services. But it doesn't yet go beyond *movement*. Given the legislative and judicial choices that fall presently to be made by the EC institutional actors, should it? And if it should, i.e. if the consequences of reverse discrimination can no longer be accepted, then who exactly should determine that this is so, and how could the sea-change be achieved in reality? These issues will now be considered in turn.

4.1. *Breaking point? Carpenter and the Court*

If there is anything still surprising about the decision in *Singh*, it is perhaps that the open-ended nature of the judgment has not really been tested until now. In *Carpenter*, a non-Community (Philippine) national is claiming a right of residence in the United Kingdom with her British spouse, on the grounds

110. "What is disappointing in the reasoning is the failure even to consider explicitly the *effect of Citizenship on the scope of the Treaty*. Again, saying that Citizenship is not intended to extend the scope of the Treaty '*to matters having no link with Community law*' simply begs the question of *what kind of link with Community law is necessary* to bring the situation within the scope of the Treaty . . . Does the Union Citizen only become a Union Citizen when they step outside the confines of their own Member State? . . . If Citizenship is to have real meaning, in particular by creating a direct link between the Union and the Citizens, then it may become increasingly unacceptable to say to the majority of Citizens who do not make use of their rights under the Treaty to live and work in other Member States that Community law has no application to their situation." Toner, op. cit. *supra* note 77, 169–70 (emphasis in original).

that he provides services from time to time in other Member States.[111] The questions before the Court of Justice read as follows:

> "In circumstances where:
> (a) a national of a Member State, who is established in that Member State and who provides services to persons in other Member States; and
> (b) has a spouse who is not a national of a Member State;
> can the non-national spouse rely on
> (i) Article 49 EC and/or
> (ii) Directive 73/148/EEC
> to provide the non-national spouse with the right to reside with his or her spouse in his or her spouse's Member State of origin?
> Is the answer to the question referred different if the non-national spouse indirectly assists the national of a Member State in carrying on the provision of services in other Member States by carrying out childcare?"[112]

Essentially, the applicant is claiming that her situation parallels that of Mr Singh and, more specifically, that ". . . persons who provide services should not have less rights."[113] The peculiar result of reverse discrimination is also alluded to where Mrs Carpenter argues that ". . . her spouse must have the same Community law rights in the UK as in another Member State. If he took his spouse with him to another Member State, that Member State would have to allow both spouses to enter."[114] It is difficult to argue with the logic of these submissions; however, the implications of granting her a right of residence are considerably broader than was the case in *Singh*. Although the applicant referred to the "parallel nature" of work, establishment and services, the scope of the latter is infinitely more extensive; although relatively few EU citizens provide services in other Member States, how many have not *received* them? The Court's expansive interpretation of services in *Bickel* – and the resultant ease with which any cross-border transaction will trigger EC law to some extent – must be borne in mind here. Can all of these – including some fairly tenuous – links with Community law establish residence rights for family members which override the policies and intentions of national immigration authorities? And, if so, then how can the minute group of individuals who have never come within the scope of EC law in any way be left outside? In some ways, then, it is not surprising that the Commission has argued against this extension of *Singh*.[115]

111. *Carpenter*, *supra* note 70; Opinion of A.G. Stix-Hackl of 13 Sept. 2001.
112. See O.J. 2000, C 122/14.
113. *Carpenter*, Opinion of A.G. Stix-Hackl, para 15.
114. Ibid., para 14.
115. Ibid., paras. 26–29; the Commission distinguishes between leaving one's Member State of origin to work in another, and "merely" providing services and never intending actually to

Of course, the Court does not have to go beyond the specific context of service providers in *Carpenter* itself; but its decision will surely conduct the course of EC law in the direction set out above – in the direction of purely internal effect, at least in the context of family member residence rights. And, if residence rights, what thereafter? So it must be asked whether the character of services *is* somehow different from work and/or establishment: not in terms of triggering EC law *per se*, but thinking more of potential limitations that might attach – effecting something of a halt at *Carpenter* and not necessarily flowing into service receipt. As noted already, and in contrast to the Advocate General, the Court in *Singh* did not really address the need for a connecting factor to exist *vis-à-vis* the rights enjoyed in another Member State and those claimed upon return home; instead, the Court promoted the notion of deterrence. In *Carpenter*, Advocate General Stix-Hackl did not consider it necessary to explore the second question referred to the Court, i.e. the extent to which Mrs Carpenter actually enabled her spouse to provide services by her provision of childcare (which could be said to reflect both the connecting factor and deterrence approaches). The Advocate General discussed instead the effects of reverse discrimination in the context of spousal residence rights, before addressing the extent to which the provision of services can remove a set of circumstances from the "purely internal" reserve.[116] Overall, she stressed that the differences between the facts in *Carpenter* and *Singh* were "not legally significant".[117] This means that Mr Carpenter, an exerciser of Community rights via the provision of services, should thereby enjoy the same rights in his own Member State as in any of the other fourteen potential host States. This clearly reflects the philosophy of *Singh*;[118] but it does *not* invoke the deterrence principle which was also (presumably) decisive in the earlier case. The deterrence factor is raised in *Carpenter* almost in passing;[119] but another consideration seems to take precedence – respect for fundamental rights, realizing to some extent the renowned vision of European citizen-

become established in any other Member State, and suggests that the *Carpenter* case should instead be aligned with *Morson and Jhanjan*.

116. *Carpenter*, Opinion of A.G. Stix-Hackl, paras. 52–58 and 61–63 respectively; to illustrate the breadth of possibility here, she referred *inter alia* to Joined Cases C-51/96 & C-191/97, *Deliège* v. *Ligue francophone de judo et disciplines associées ASBL*, [2000] ECR I-2549 (athlete competing in another Member State) and Joined Cases C-34–36/95, *Konsumentombudsmannen* v. *De Agostini and TV-Shop*, [1997] ECR I-3843 (where there is no physical movement by either the provider or recipient of services, but the services themselves are provided across a frontier).

117. *Carpenter*, Opinion of A.G. Stix-Hackl, para 64 et seq.

118. *Singh*, para 23.

119. *Carpenter*, Opinion of A.G. Stix-Hackl, para 78.

ship sketched by Advocate General Jacobs in *Konstantinidis*, even before Maastricht.[120]

The only real limitation proposed by Advocate General Stix-Hackl in *Carpenter* is, in essence, a temporal one – that Mrs Carpenter has residence rights in the UK only so long as her husband continues to provide services in other Member States.[121] Briefly turning to the risk of abuse here – essentially, that Community nationals might endeavour to bring themselves within the scope of the Treaty purely to evade national immigration decisions – the Advocate General simply notes that no such concern existed (or was claimed by the United Kingdom) in the present case.[122] She did not grapple with this question in a more general sense, even though, as noted above, she would have had curtailing authority from which to draw on this point.[123] Moreover, the potential for what might be termed "deliberate" service provision is, given the both vast and temporary character of services, surely more difficult to rein in than work or establishment.

The questions referred in *Carpenter* present a number of choices for the Court. The strictest route would be to distinguish *Singh* and deny home residence rights in respect of service provision – in other words, to follow the submissions of the Commission. Something of a middle-ground might be achieved by granting residence rights to Mrs Carpenter but hinging that decision on the second question referred, thus emphasizing the element of deterrence. Finally, to extend the reach of EC law most completely, the Court could follow the Opinion of Advocate General Stix-Hackl, which takes the principles established in *Singh* considerably further. This would ensure the most comprehensive protection for individuals exercising (any) Community rights or freedoms. The Court need go no further than service providers in *Carpenter* itself, but the slippery slope of service receipt will inevitably materialize in consequence. And if short cross-border trips can be held to justify residence rights at home for third country nationals, then the criterion of movement as a connecting factor becomes at once empowering and futile. It is unlikely that, as a stratagem, it could be contained to movement or to residence rights; an expansive decision in *Carpenter* would thus mark the beginning of the end for reverse discrimination more generally, at least in the context of (natural) persons. This would be a remarkable step for the Court to initiate. In the present climate of law reform, it would not be acting alone, however.

120. Ibid., paras. 80 et seq.; see also Opinion of A.G. Jacobs in Case C-168/91, *Konstantinidis* v. *Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt*, [1993] ECR I-1191, esp. at para 46.

121. *Carpenter*, Opinion of A.G. Stix-Hackl, para 73.

122. Ibid., paras. 74–5.

123. See notes 71 and 72 *supra*.

4.2. *The consequences of citizenship: The Commission proposals*

If the outcome of *Carpenter* seems precipitous, then the ideas recently tabled by the Commission are even more controversial. Tucked away in the midst of a Title IV EC proposal, for a draft directive on family reunification,[124] lies Article 3(1)(c), which seeks to bring Union citizens who have never exercised their right to move *at all* within the scope of EC law; Article 4 of the same draft directive establishes how:

> "By way of derogation from this Directive, the family reunification of third-country nationals who are family members of a citizen of the Union residing in the Member State of which he is a national and who has not exercised his right to free movement of persons, is governed *mutatis mutandis* by Articles 10, 11 and 12 of Council Regulation (EEC) No 1612/68 and by the other provisions of Community law listed in the Annex."

The proposal amounts, in effect, to a legislative reversal of *Morson and Jhanjan*; in time, it may well provide solace for the Carpenters if the Court does not. The rationale behind this exceptional move is found in the ninth recital of the draft directive's preamble, which states simply that it is "to avoid discriminating between citizens of the Union who exercise their right to free movement and those who do not". In the explanatory memorandum attached to the proposal, the Commission acknowledged that this was "hitherto" a purely internal situation, "subject solely to national rules". But it argued that the resulting "unwarranted" difference between Union citizens who have moved and those that have not generates a gap which must be filled, on the grounds that "Union citizenship is indivisible".

Like the applicant's submissions in *Carpenter*, this cannot be disputed in terms of logic. In the first instance, however, whether this aspect of the proposal survives Council adoption remains to be seen. It would probably have been wise to predict Member State antagonism, given the potent intrusion into domestic immigration competence mooted. At the time of writing, however, the matter has not prompted any substantive discussion – within either the Economic and Social Committee[125] or the European Parliament;[126] but, perhaps more astonishingly, the provision does not appear to have caused (to date, at least) any ripples within the Council at all.[127] But even if the directive

124. COM (1999) 638 final.

125. See O.J. 2000, C 204/9; the existence of the provision is noted (see para 1.5) but its implications are not subsequently discussed (or even mentioned).

126. See A5-201/2000 and O.J. 2001, C 62/4.

127. Other aspects of the proposal were discussed at the Justice, Home Affairs and Civil Protection Council from 28–9 May 2001 (see O.J. 2001, C 01/203) and on 27 Sept. 2001 (O.J. 2001, C 01/334).

is adopted, should a bid to offset reverse discrimination really be rooted in Title IV EC? The (third country) nationality of family members has never been sufficient to trigger a Community law link; but this is not what would be transcended. The substantive effect of the proposal is tied to Regulation 1612/68; and no longer needing to be a worker to come within its scope is in fact an application of *Martínez Sala*. This may seem unorthodox, but it is a mechanism which stems wholly from the reasoning of the Court. A more fundamental difficulty with Title IV as legal basis is that its scope of application is limited in a geographical sense, in respect of Denmark, Ireland and the United Kingdom.[128] Because of this, the danger for discrepancies in standards of treatment remains a real one, with rights of residence for family members potentially depending still on the nationality of the EU citizen. Moreover, it would seem that family reunification rights for non-moving citizens could probably have been brought within the open-ended wording of Article 18 EC, perhaps as part of the Commission's proposed catch-all movement and residence rules.

In any event, now that the Commission has taken the question on board, the reverse discrimination principle looks set to undergo a radical overhaul. It is doubtful that the effects could (or should) be contained to family residence rights. All of the case law discussed in this paper has chipped away at the logic of *Saunders*, even if never quite displacing it entirely. The Court may take that crucial step in *Carpenter*; but even if it doesn't, it is likely that the step will be taken legislatively. And so, we are poised on the brink of a fundamental change to the scope of application of EC law. Leaving things as they stand (i.e. allowing the legitimacy of reverse discrimination) does not seem to be an option – even in legal terms, given the evolution of EC law as it affects persons in recent years. But the consequences actually of changing things should not be underestimated, in ideological and political terms as well as anything else. The choices currently being made by the Court and Commission seem more and more to lead towards an inevitable step. But what deserves carefully to be considered is who exactly should take it, and how.

4.3. *"Curing" reverse discrimination: Whose task?*

Writing on the decision in *Singh*, White drew from the views of Advocate General Mischo delivered almost a decade before then; in relation to the free movement of goods, the Advocate General remarked that "[r]everse discrimination is clearly impossible in the long run within a true common

128. See the Protocols annexed to the EC Treaty and TEU on the respective positions of Denmark, Ireland and the United Kingdom as regards their opt-outs from the development and application of EC and EU immigration law; see also Art. 69 EC.

market, which must of necessity be based on the principle of equal treatment. Such discrimination must be eliminated by means of the harmonization of legislation."[129] This comment highlights two basic points; first, a conviction that reverse discrimination needed to be corrected and, second, that Community harmonization was the way in which this should be done. White transferred the Advocate General's logic to the free movement of persons, basing his justification for this on the concept of EU citizenship.[130] The Commission's proposals on family reunification certainly fit with this view. But it cannot be assumed or taken for granted that the second part of the Advocate General's proposition necessarily flows from the first; reverse discrimination may well be a real problem, but it is not at all clear how best it can be redressed.

4.3.1. *Extreme measures: What* not *to do*

If the argument is framed in terms of "gaps" in protection from the perspective of individuals, things could simply be left as they are, allowing any anomalies to persist; essentially, this suggests that the advantages ascribed to consistency of treatment and the uniform application of Community law reach their limit at the wall of the purely internal reserve. But questions raised throughout this paper about the (in)coherence of the "purely internal" rule in ECJ case law, the expanding reach of EC law and its impact on the rights and freedoms of individuals and the corollary supposition that occurrences of reverse discrimination will increase as a result, cannot be dismissed so readily merely by curbing the efficiency of uniformity. There is also a question of public perception here. Where instances of reverse discrimination are highlighted in the public domain – as they have been in Scotland and the UK more generally on the question of Scottish university fees, for example – the typical conclusion is not that EC law "gives" certain rights to nationals of other Member States over and above those available domestically, but that the Community has somehow deprived home nationals of the benefit in question. This is not actually true, but it is a common misunderstanding. And is it truly rational to say to an aggrieved complainant that things would be different/better if only, for example, s/he held a diploma from any Member State but his/her own?

However, as stated expressly at the beginning of this paper, a wholly centralized or "absolute" EU competence is equally untenable; it is simply erroneous to argue that all Member State issues should, in fact, become Community issues. It doesn't wash in terms of logic, nor does it take account of the deep-seated social, cultural, political and financial objections that would oppose such a radical move in the first place. The division of competence must instead

129. Joined Cases 80 & 159/85, *Nederlandse Bakkerij Stichting* v. *EDAH*, [1986] ECR 3359, Opinion of A.G. Mischo, p. 3375.

130. White, op. cit. *supra* note 71, 532.

be separated out. And the character of EC law on the free movement of persons, shot through as it is with the emerging consequences of citizenship, does merit a revision of the legitimacy of reverse discrimination – even more so, it is submitted, than the interests of the internal market in the free movement of goods. Establishing a distinction between these freedoms would reflect a difference in approach already evident between goods as commodities and people as, basically, people;[131] but it is not intended here to argue the case for or against reverse discrimination in respect of goods, but simply to say that whatever (market) arguments can be put forward in that context are shored up more deeply still in respect of persons.

There is more than one way in which this objective could be realized, however. Several authors have sited the debate in the distribution of competence, reflecting the viewpoints of Cannizzaro and Poiares Maduro discussed above when looking at the normative character of reverse discrimination. For example, O'Leary has suggested that "[t]he crux of maintaining the distinction between Community and internal cases is the assertion of which level of authority – Community or national – remains competent to regulate an individual's rights."[132] Similarly, Staples has argued that "[t]he omission on behalf of the Community to address matters related to reverse discrimination is explained by the principle of attribution of powers that has limited Community competence to those policy areas found in the [EC] Treaty."[133] The solution must lie, then, within the domain of shared or concurrent competence and so, in practical terms, the options can be broken down as follows. First, Member State legislatures could themselves take on board a responsibility to "... trad[e] up to Community standards. ..."[134] Second, this could also be achieved via national courts. Third, reverse discrimination could be "... eliminated by the Community legislature itself. ..."[135] Or, finally, this step could be taken by the Court of Justice. Two layers of conflict are revealed by organizing the question in this way. First, at the level of governance: which level – EC or national – should bear the responsibility for reform? Second, on the type of governance at either level – legislative or judicial – which should actually act.

4.3.2. *A national solution to an EC "problem"*

Looking first at the possibility for Member State redress, this means in effect that the influence of the EC on domestic standards would be a catalytic

131. See note 33 *supra* and accompanying text.
132. O'Leary , *The Evolving*. . . , op. cit. *supra* note 77, p. 276.
133. Staples, *The Legal Status of Third Country Nationals resident in the European Union* (The Hague, Kluwer Law International, 1999), p. 15.
134. White, op. cit. *supra* note 71, 532.
135. A.G. Stix-Hackl in *Carpenter*, para 58.

one, leaving the responsibility for actual change at Member State level and thus skirting more difficult competence and sovereignty questions. The fact remains that domestic Member State standards would still be "traded up" to their Community counterparts, generating something of an indirect harmonization process. If Member State responsibility is seen to flow from, but is not strictly governed by, Community requirements, then both effectiveness and pragmatism are well served.[136] A defined catalytic function for the EC in this way demands more, however, than an amended legal framework; it would be perilously naïve to underestimate the extent of the required corresponding shift in political culture. Furthermore, there remains a danger of inconsistency of rights, if the EC impetus of domestic law reform is to be an entirely voluntary and non-binding one. The catalytic approach may well work for some competence spheres, and particularly for especially sensitive ones or in areas of competence still embryonic at EU level,[137] but it is not necessarily the best approach for matters now rooted in the ideology of citizenship.

The Court of Justice has looked, albeit peripherally, at the potential role of national courts in this regard. In *Steen II*, for example, and having found in *Steen I* that the facts of the case were wholly internal, the Court held as follows:

> "It is for the national court, faced with a question of national law, to determine whether there is any discrimination under that law and whether that discrimination must be eliminated and, if so, how . . . Community law does not preclude a national court from examining the compatibility with its constitution of a national rule which, in a situation unconnected with any of the situations contemplated by Community law, treats national workers less favourably than nationals from other Member States."[138]

In other words, any obligation to cure reverse discrimination must, the Court held, stem from national law. This reflects the situation which arose in *Pistre*, discussed above;[139] it seems also to have informed the national judge's reference in *Angonese*,[140] although the point was not picked up in either case by the Court of Justice. Poiares Maduro seems to favour the capacity of national courts over the ". . . strong risks of majoritarian bias . . . existing in the national political process . . . ", submitting, therefore, that ". . . national courts should be empowered to decide when reverse discrimination is accept-

136. This idea was reflected to a certain extent in the "concentric circles" model of EC human rights competence developed by Lenaerts almost a decade ago (see Lenaerts, "Fundamental rights to be included in a Community catalogue", 16 EL Rev. (1991), 367–390).

137. In this context, see Nic Shuibhne, op. cit. *supra* note 3, pp. 193–6.

138. Case C-132/93, *Steen* v. *Deutsche Bundespost,* [1994] ECR I-2715, paras. 10–11; see also, Johnson and O'Keeffe, op. cit. *supra* note 69, 1339–40.

139. See note 36 et seq. *supra* and accompanying text.

140. See *Angonese*, para 14; see also, Opinion of A.G. Fennelly, para 7.

able taking into account the broader public interests and the burden placed on the home nationals discriminated against."[141] Although writing earlier in time, Cannizzaro questioned the legitimacy of the national court approach;[142] he pointed out that the mechanism would work only in one direction, given that national judges cannot assess the validity of *Community* measures and, even more basically, that the national legal order might not actually provide for judicial review or might provide only for limited forms. Elaborating on the method of "empowerment" for national courts, however, Poiares Maduro suggested that the ECJ ". . . should simply state that it is for national courts, having regard to the facts of the case, to assess whether the discrimination found in national rules against home nationals can be justified in light of specific national interests."[143] This goes beyond a basic restatement of *Steen II*, since not all national courts are "empowered" at national level to perform this interpretative task. Poiares Maduro argues that the requisite authority can be implied from the supremacy of EC law, but it is stretching things a bit to argue that the ECJ alone should, or even can, fill this particular legitimacy gap; until EC law itself can accommodate wholly internal situations, how can its "supremacy" actually work here? And more fundamentally still, the reality that national courts may vary in their interpretation as to whether any given instance of reverse discrimination should be undone (both within and across Member States) generates considerable inconsistencies in the treatment of individuals – the very result of reverse discrimination that is surely most injurious in the first place.

4.3.3. *An EC answer*

On another view, the EC dimension of the reverse discrimination problem means that it can be successfully addressed only by EC measures. This is not necessarily a straightforward solution either; Cannizzaro, for example, points out that ". . . it may not seem appropriate to compare with regard to the Community principle of equality different sets of norms, belonging to different legal systems and having different aims [and that] [n]ational activities which would come under consideration with respect to the issue of reverse discrimination are not intended to implement Community obligations and may thus seem to fall outside the field of application of EC law."[144] The basic question here, then, is the extent to which the evolution of EC law as it affects persons – and the reality of EU citizenship in particular – can now be said to override these concerns. And, on balance, it is submitted that action via Community measures avoids the legitimacy and inconsistency pitfalls of the

141. Poiares Maduro, op. cit. *supra* note 8, p. 137.
142. Cannizzaro, op. cit. *supra* note 29, 31–2.
143. Poiares Maduro, op. cit. *supra* note 8, p. 139.
144. Cannizzaro, op. cit. *supra* note 29, 32.

national court (or legislature) approach. Writing even before the introduction of EU citizenship, Pickup had argued while reverse discrimination ". . . may be eliminated by the enactment of Community legislation, but given the difficulties and expense of dealing with such an enormous area of strong national interest . . . it would be infinitely more desirable for the Court of Justice to breath (sic) life and sense into its interpretation of Article [39] and freedom of movement for workers."[145] But is it not even more divisive for the Court rather than the legislature to seek to change precisely such areas of "strong national interest"?

This debate is obviously a much broader one which arises more or less across the spectrum of EC law – most notoriously, perhaps, in the context of sex discrimination. Employing the formula that sex discrimination in EC law is based essentially if not exclusively on the sex of the person concerned, in *P* v. *S*, the Court of Justice held that discrimination related to gender reassignment came within the scope of Article 141 EC;[146] but in *Grant* (and, more recently, in *D and Sweden*), it was found that discrimination related to sexual orientation did not.[147] The substantive issues at play in all of these decisions are well documented and will not be discussed here;[148] but something of a sub-plot can be discerned i.e. the role of the judiciary in law reform. The views of Advocate General Tesauro in *P* v. *S* are particularly striking in this regard:

> "To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role . . . I consider that it would be a pity to miss this opportunity of leaving a mark of undeniable civil substance, by taking a decision which is bold but fair and legally correct, inasmuch as it is undeniably based on and consonant with the great value of equality."[149]

The Court's decision in that case clearly reflects the spirit of this view, which is probably why its subsequent stance in *Grant* – which asserted that "[i]t is for the legislature alone to adopt, if appropriate, measures which may affect [the present state of the law]"[150] – seems all the more conspicuously cautious; it also went directly against the views of Advocate General Elmer in the case.

It may be that, in *Grant* and *D*, the Court was mindful of Article 13 EC, which empowers the Community legislature to adopt measures in order to

145. Pickup, op. cit. *supra* note 8, 139.
146. Case C-13/94, *P* v. *S and Cornwall County Council*, [1996] ECR I-2143.
147. Case C-249/96, *Grant* v. *South West Trains*, [1998] ECR I-621 and Case C-122/99, *D and Sweden* v. *Council*, [2001] I-4319.
148. See e.g. Iris Canor, "Equality for lesbians and gay men in the European Community legal order – 'they shall be male and female'?", 7 MJ (2000), 273.
149. *P* v. *S*, Opinion of A.G. Tesauro, paras. 9 and 24.
150. *Grant*, para 35; see also, *D and Sweden*, paras. 38 and 49.

combat discrimination on a number of grounds, including sexual orientation. But such deference to the legislature doesn't really match with the Court's more activist approach in the domain of, for example, the implications of citizenship. The underlying issue – the role of the judiciary – has been raised most recently by Advocate General Geelhoed in *Baumbast*, given that Regulation 1612/68 has never been amended by the legislature, notwithstanding considerable change in the interim – both legal and social.[151] The particular question being considered by the Advocate General is the changing nature of family relationships; having highlighted the inadequacy of Regulation 1612/68 properly to reflect the evolving social and legal reality, he argues that ". . . the Court is therefore compelled, in interpreting [Regulation 1612/68] to take into consideration not only the wording of the provisions themselves but also the changed circumstances."[152] Fleshing out the ambit of this duty, the Advocate General continued as follows:

> "European legislation on freedom of movement for workers no longer meets the needs of the time. In other words the legislation is in need of overhaul. For those reasons Community law needs to be interpreted in such a way as to take account of changes in social conditions. In that way the *lacunae* which have appeared in Community legislation as a result of a failure to overhaul it can be prevented from resulting in undesired legal consequences."[153]

The legitimacy of this approach is open to something of a jurisprudential debate; but it certainly provides a strong mandate for the Court, one which resonates sharply in the reverse discrimination debate. On the one hand, it could be argued that the Court, taking a *Grant* and *D* line, should steer clear of effecting such radical changes – in, ostensibly, EC law but, in reality, in the laws of the Member States – which, otherwise, leave it open to charges of (improper) judicial law-making. Allowing the legislature to work these issues out allows more democratically for political discussion and for the involvement of the Member States, acting via the Council, and the people, via

151. *Baumbast*, Opinion of A.G. Geelhoed, para 19 *et seq*. Many of the issues raised in this case – including, e.g., the status of cohabiting partners and of divorced persons, as well as the status of same sex partners – are being considered at present by the EC legislature: see e.g. the 1998 proposals for reforming Regulation 1612/68 (see note 89 *supra*), and the proposals on the right of movement and residence (note 99 *supra*); see also, in the domain of third country nationals, Proposal for a Council Directive concerning the Status of Third-Country Nationals who are Long-Term Residents and Proposal for a Council Directive on the Right to Family Reunification (COM (2001) 127 final (13 March 2001), and COM (1999) 638 final (1 Dec. 1999)/COM (2000) 624 final (10 Oct. 2000) respectively). The Court has been generous in the context of divorced persons and Regulation 1408/71, see e.g. *Humer*, para 42 and *Kulzer*, paras. 48 and 51–2.

152. *Baumbast*, Opinion of A.G. Geelhoed para 66.

153. Ibid., para 87.

the European Parliament. The other side of this coin should also be raised, however, i.e. the slowness with which the legislature actually acts. The 1999 family reunification proposal, for example, is still in something of a legislative limbo; and even if the proposal is accepted, there will be a further time delay before the directive will have to be transposed into national law. Yet another, more complex, question needs also to be answered here: have the Member States ever reversed legislatively the interpretative advances brought about by the Court in the context of workers? They have certainly criticized many of them; and yet, they abide by the consequences of decisions like *Singh* and *Martínez Sala*. Does that in itself supply an indirect democratic mandate which could be used now in the context of reverse discrimination?

5. Conclusion: Time to move on?

Referring to the work of D'Oliveira, Poiares Maduro reproduces the argument that ". . . aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self-contradictory."[154] If one applies an absolute definition of the internal market (area with no internal borders), then this argument obviously rings true. But even allowing for less radical interpretation – even accepting that degrees of national frontiers or degrees of national competence still remain – developments in EC law on the free movement of persons have called the wholly internal rule into question at the frontier of reverse discrimination, so that D'Oliveira's logic still resonates. Moreover, the extent to which the "human" dimension of movement has been pushed now to the fore – entwining, as it has, the ideology of "market" freedoms with the discourse of fundamental or human "rights" (most explicitly so to date in Articles 18 EC and 45(1) of the Charter) – has generated a far more complex picture of free movement than is often appreciated. This can be bolstered further by reflecting on other strands of the case law – the generosity of the scope attached to provisions on the free movement of persons, the door opened (subtly) in *Singh* and, perhaps most significantly of all, the continuous underpinning by the Court of the implications of EU citizenship. All these legal developments have the potential to impinge acutely on the rights and lives of countless EU citizens – but almost exclusively only if they move, only if they leave their own Member State and form some degree of connection, however temporary or financially insignificant, thinking particularly of services, with any of the other fourteen.

154. Poiares Maduro, op. cit. *supra* note 8, p. 126, referring to Jessurun D'Oliveira, "Is reverse discrimination still possible under the Single European Act?" in *Forty Years On: The Evolution of Postwar Private International Law in Europe* (Deventer, Kluwer, 1990), p. 84.

The extent to which EC law can matter in turn renders all the more artificial the triggering condition of movement in the first place.

It is not that reverse discrimination is a new phenomenon; it is a long-standing consequence of the long-standing wholly internal rule. But, taking into account the integrative forces and legal revisions described throughout this paper, both its existence and level of incidence have become less justifiable. Looking at the reach of decisions like *Grzelczyk*, and the potential reach of *Carpenter* and recent legislative proposals, the negation of reverse discrimination takes on the character of inevitability. In other words, it does now seem time to move on. Even against the backdrop of the Laeken Declaration and European Convention, and the urge somewhat holistically to reflect on the direction of European integration promoted in consequence, the less certain question is how exactly to proceed – or more accurately, who should proceed. In the specific context of EC law on the (until now) movement of persons, there is much political merit in fixing a catalytic responsibility at domestic level; there is also, however, a very real danger of inconsistency of effect and, in turn, retained inconsistency of opportunities for EU citizens who don't move anywhere. In the absence of a committed, concerted and somewhat coordinated national effort, the locus of responsibility may well be better assigned to the Community. Even here, another layer of conflict arises, in the sense of deciding whether the reverse discrimination problem is one best tackled legislatively or judicially. This debate spreads well beyond the specific context of reverse discrimination and throws into focus the respective roles of both arms of governance in the sphere of law reform. Significantly, and perhaps encouragingly, however, we see something of a common objective underlying pending advances in EC law. The EC legislature and judiciary have an opportunity to proceed as one, so what remains to be seen is what choices will actually be made – by the Court in *Carpenter*, by the legislature as it addresses family reunification and citizenship. Perhaps a line will be drawn under the expansionist potential so clearly now at the Community's disposal; even this, however, will have to be explained. If nothing else, the scope of EC law, as it bears on EU citizens, should at least be a bit less uncertain.

Postscript

Since the time of writing, two key developments have shifted the course of the reverse discrimination debate once again. On 11 July 2002, the Court extended an EC right of residence to Mrs Carpenter, invoking the deterrence and effective exercise of Community rights doctrines stemming from *Singh*. The judgment has thus fuelled considerably the expansionist momentum that

has characterized the ECJ stance on the free movement of persons in recent years. The Commission had seemed, on the contrary, to backtrack – in the most recent version of its draft directive on family reunification (COM (2002) 225 final), the EU citizen dimension (what was draft Article 4) was removed. But the Commission has postponed more than rejected the reverse discrimination challenge; more precisely, it has tied the right of family reunification for EU citizens who never move at all to its work on citizenship and movement rights more generally and, in this vein, has suggested tantalizingly that "[t]he alignment of the rights of all Union citizens to family reunification will be reviewed later, once that recasting is complete." The Commission might thus appear more guarded initially but it has probably strengthened its arsenal by removing the dubious link with Title IV EC and concentrating its efforts more properly on EU citizenship and its consequences. This particular story seems, therefore, far from over.